STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2004
v KENDALL LAMAR DONALDSON, Defendant-Appellant.	No. 248597 Wayne Circuit Court LC No. 03-000437-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KENDALL DONALDSON, Defendant-Appellant.	No. 248634 Wayne Circuit Court LC No. 02-013450-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DARRELL SOLOMON, Defendant-Appellant.	No. 249209 Wayne Circuit Court LC No. 02-013450-02

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendants Kendall Donaldson and Darrell Solomon were tried jointly before different juries in connection with two separate robbery offenses in Detroit on October 3, 2002. In Docket No. 248597, Donaldson was convicted of two counts of armed robbery, MCL 750.529, felon in

possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the robbery of the Gold Coast Lounge.[1] In Docket No. 248634, Donaldson was convicted of two counts of armed robbery, felon in possession of a firearm, and felony-firearm in connection with the robbery of the Deluxe Coney Island restaurant. In Docket No. 249209, Solomon was convicted of two counts of armed robbery, also in connection with the Deluxe Coney Island robbery, but acquitted of felony-firearm. These three appeals have been consolidated.

I. Facts and Proceedings

Two robberies occurred in Detroit within a block of each other during the early morning hours of October 3, 2002. Two men with pantyhose over their faces robbed Charles Giles and Ben Robinson at gunpoint at the Deluxe Coney Island at approximately 12:30 a.m. One man—later identified as Donaldson—carried a handgun and demanded Giles' and Robinson's wallets. The second man—later identified as Solomon—carried a shotgun, stood beside Donaldson, and helped collect Giles' and Robinson's stolen belongings. The robbers took Giles' and Robinson's wallets, which contained their cash, credit cards, driver's licenses, and miscellaneous cards.

The second robbery occurred outside the Gold Coast Lounge, half a block away from the Deluxe Coney Island. John Pierce and Eugene Szymanski were working as parking attendants when two men—identified as Donaldson and Solomon—approached and asked what kind of club the Gold Coast Lounge was. Szymanski replied that if they did not know, they had no reason to go in. Pierce recognized the men from a similar encounter the week before. Donaldson then brandished a gun. Szymanski tried to defend himself by throwing a flashlight at Donaldson, but Donaldson shot Szymanski in the abdomen causing a flesh wound. According to Pierce, Donaldson appeared shocked when he shot Szymanski, and began to flee. Solomon told Donaldson to get money. Donaldson pointed the gun at Pierce, who gave him $1,300. Donaldson and Solomon then fled in a car.[2]

The time of the Gold Coast Lounge robbery was in dispute. Pierce initially told the police that it occurred around 2:30 a.m., and Szymanski reported that it occurred around 1:45 a.m. Detroit Police Officer Laron Simmons testified that he received a dispatch on the robbery around 1:30 a.m. However, Donaldson had been arrested between 1:00 and 1:15 a.m.

Donaldson and Solomon were arrested a few blocks apart near the two robbery scenes. The officers involved in their arrests agreed to meet in the Deluxe Coney Island parking lot to share information and transfer Donaldson to the squad car holding Solomon. When the police cars arrived in the parking lot, Giles, who had been watching from inside the Coney Island, ran out and shouted to Robinson that the police had caught the robbers. Robinson looked at the arrestees, but he could not determine whether they were the robbers. The officers testified at trial

[1] Solomon was not charged with any offense committed at the Gold Coast Lounge.

[2] Giles and Szymanski both testified that a third man was involved in the robberies. Szymanski did not identify Solomon at trial, and there was no testimony that either Szymanski or Pierce identified Solomon at a corporeal lineup.

that they did not intend to hold an on-scene identification at the Coney Island, and that they would not have met there if they had known Giles and Robinson were still there. The police gave Giles and Robinson their personal effects, such as their driver's licenses and ATM cards, which they had found in Solomon's pockets.

Detective James Blanks of the Eleventh Precinct conducted lineups for Donaldson and Solomon on the afternoon of October 3, 2002. Donaldson was five feet, four inches tall, and Blanks could not find four other men of similar height, so he arranged a photographic lineup using mug shot photographs obtained from the precinct files. Giles, Pierce, and Szymanski all selected Donaldson's photograph from the array. Giles also identified Solomon at a corporeal lineup. Robinson could not make an identification at either the corporeal or photographic lineup.

Before trial, Donaldson moved to suppress Giles' photographic identification of him. He argued that because he was in custody, the police were required to conduct a corporeal lineup, not a photographic lineup, and that the photographic lineup was unduly suggestive because the photograph showed Donaldson wearing the same shirt and hairstyle worn by the robber. He also argued that Giles identified him based on seeing him in the parking lot.

At a *Wade*[3] hearing, Giles testified that the three robbers wore pantyhose over their faces, but he could make out Donaldson's facial features or observe that his hair was braided. Donaldson wore a jacket, but Giles could see a few inches of a red shirt underneath. He saw the side of Donaldson's face for only two or three minutes when Donaldson was returned to the Coney Island parking lot. He identified Donaldson's photograph in the array based on several factors, including his facial features, the "size" of his hair, and his shirt color. Giles downplayed his reliance on Donaldson's shirt color, and explained that he had difficulty perceiving the shirt colors in the other photos because the photos were blurry and because Giles was color-blind. Giles also denied selecting Donaldson's photograph based on Donaldson's braided hair because he had seen Donaldson's facial features well enough to not have to rely on his hair. He added that he had identified Donaldson at the preliminary examination, when his hair was not braided. He emphasized that he would have picked out Donaldson regardless of what color shirt he was wearing and regardless of whether his hair was braided, because he was "going by his face and his structure and everything, it was his face."

Blanks testified that he did not hold a live lineup with Donaldson, who was five feet, four inches tall, because he could not find enough people of similar height. Blanks could not have filled out the lineup with taller persons, because this would have been too suggestive. Instead, Blanks arranged a photographic lineup using Polaroid mug shots of Donaldson and five other persons with a similar appearance, age and size. The array was acceptable to the lineup attorney. Giles chose Donaldson's photo.

On cross-examination, Donaldson's attorney questioned Blanks about his efforts to find suitable participants for a corporeal lineup before resorting to the photographic procedure. Blanks stated that there were more than twenty persons incarcerated at the Eleventh Precinct that

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

day, but none were near Donaldson's height. He contacted the nearby Seventh and Twelfth Precincts, but no one there was the right height. Blanks acknowledged that none of the other photographs showed a person wearing a red shirt or braided hair, but their closely cropped haircuts appeared similar to defendant's hairstyle.

The trial court found that Giles had a good opportunity to observe the robber and that he gave the police an accurate description before seeing Donaldson. It also gave credence to Blanks' testimony that he could not find four other black males who matched Donaldson in height and other characteristics. The court concluded that Blanks made the correct decision to conduct a photographic array, and that the array was fair. The court did not believe that Donaldson's braids were suggestive because, although Donaldson was the only man with braided hair, his hair in the photograph appeared to be short and combed straight back, like the men in the other photos. The trial court found no other indication of suggestiveness. It found no taint from the momentary parking lot encounter.

II. Docket Nos. 248597 and 248634

Donaldson claims that the trial court erred in denying his motion to suppress all identification testimony. He argues that the police improperly used a photographic lineup procedure when he was already in custody, and that all subsequent courtroom identification testimony was tainted by this invalid procedure.

The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). The trial court's decision to admit an in-court identification is also reviewed for clear error.[4] *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000), remanded in part on other grounds, 465 Mich 884 (2001). We review a trial court's findings of fact pertaining to motions to suppress identification for clear error. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

Generally, photographic lineups are not permitted where the defendant is in custody and available for a corporeal lineup. *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). However, in *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), our Supreme Court stated that a photographic lineup may be used in lieu of a corporeal lineup where there are an insufficient number of persons available with the defendant's physical characteristics.

[4] It is not clear whether defendant raises this issue only with respect to Giles' identification in connection with the Coney Island robbery, or also with respect to Szymanski's and Pierce's identifications in connection with the Gold Coast Lounge robbery. In any event, because Donaldson moved only to suppress Giles' identification, this issue is preserved only as to Giles. Donaldson's arguments that the photographic lineup was improper, and that the array was unduly suggestive, are factually pertinent to all three witnesses. But because Donaldson fails to establish error with respect to Giles, he also fails to establish plain error affecting his substantial rights with respect to the unpreserved identification issues involving Szymanski and Pierce. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Here, Officer Blanks testified that he tried to compose a corporeal lineup, but he could not locate five black males of Donaldson's height in either the Eleventh Precinct or the two nearest precincts, the seventh and twelfth. He felt that a corporeal lineup would be unfairly prejudicial if the other participants were notably taller than Donaldson. The trial court gave credence to Blanks' explanation, noting that a corporeal lineup would have required four other black men who were not only similar to Donaldson in height, but who also shared characteristics such as complexion and build. The trial court further noted that Blanks did an "excellent" job in composing a photographic array using photographs of men who resembled Donaldson. Because we defer to the trial court's factual finding that suitable persons were not available for a corporeal lineup, *Gray*, *supra* at 115, we conclude that the trial court did not err in finding that the circumstances justified use of a photographic lineup.

Donaldson argues that Blanks should have made more exhaustive efforts to locate suitable participants for a corporeal lineup from other nearby precincts and from the ranks of police department employees, and contends that the trial court should have taken judicial notice of non-record evidence regarding the location of precincts and the number of department employees. However, the police are not required to make endless efforts to arrange a corporeal lineup. *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). In *People v Hider*, 135 Mich App 147, 149-150; 351 NW2d 905 (1984), this Court was satisfied that the police made sufficient efforts to compose a fair corporeal lineup before resorting to a photographic lineup where the defendant was of a "rare physical type" for the county (black male, more than fifty years old, approximately two hundred pounds and six feet tall). Although the prosecutor in *Hider* did not present direct evidence of the number of tall, older black men available for a lineup, this Court approved the use of a photographic lineup because the police attempted to arrange a corporeal lineup, but were unable to do so. *Id.* at 150. Similarly, we note that Donaldson's height is observably below average, and we are satisfied that Blanks' inability to compose a fair corporeal lineup was due to the difficulty of finding suitable participants, and not his lack of effort.

Donaldson further argues that his in-court identifications should have been suppressed because they were influenced by the improper photographic procedure, and the witnesses had no independent basis for identifying him. If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the prosecutor must establish by clear and convincing evidence that the witness has an untainted, independent basis for identifying the defendant before the in-court identification will be allowed. *Gray*, *supra* at 115. Donaldson does not fully explain on appeal why the photographic lineup was suggestive, but at trial he contended that he was easily recognizable from his braided hair and red shirt. He also maintained that Giles identified him not from the robbery, but from his observations when the police returned to the Coney Island parking lot with Donaldson and Solomon in their custody.

The trial court found that the procedure was not unduly suggestive. The court observed that Donaldson's braids were similar to the short, combed-back hairstyles of the other men in the photographs, and credited Giles' testimony that he identified Donaldson from his face, not the braids. The court also credited Giles' testimony that he did not select Donaldson's photograph based on the red shirt, and that Donaldson had worn a jacket during the robbery that covered all but a few inches of the shirt. With respect to the encounter in the parking lot, the trial court found that Giles caught only a brief glimpse of the side of Donaldson's face, and that this did not

influence any subsequent identification. Because the trial court found that the identification procedure was not unduly suggestive, and this finding is supported by the evidence, we need not address whether Giles or any other witness had an independent basis to identify Donaldson at trial.

Donaldson argues that the evidence was insufficient to convict him of the robbery, assault, and firearms charges in the Gold Coast Lounge robbery because the overwhelming evidence established that he was already in police custody when this crime was committed. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

In his original statement to the police, Pierce stated that the robbery and shooting occurred around 2:30 a.m. Szymanski originally told the police that the robbery occurred around 1:45 a.m. However, Officer Kory Karpinsky testified that he arrested Donaldson around 1:15 a.m., approximately half an hour after first receiving the dispatch on the Coney Island robbery. Karpinsky's partner, Officer Tarek Bazzi, estimated the time of arrest as 1:00 a.m. Officer Kyle Bryant estimated that the time of arrest was between 12:40 and 12:45 a.m., but he was not present at the arrest.

At trial, Pierce testified that he was mistaken when he gave the 2:30 a.m. estimate to the police, and explained that he had been extremely stressed by the robbery and loss of money. Szymanski also testified that he was mistaken in his statement, and estimated that the crime occurred "approximately prior to 1:00." He explained that he had not been wearing a watch. Officer Laron Simmons testified that he arrived at the Gold Coast Lounge around 1:50 or 1:55 a.m., which was fifteen to twenty minutes after he received the dispatch notice of the robbery and shooting.

The jury could have found from Simmons' testimony that he was dispatched to the Gold Coast Lounge robbery around 1:30 a.m., and that the robbery occurred fifteen to thirty minutes before the dispatch, or before 1:00 a.m., which would have been before Bazzi and Karpinsky arrested Donaldson. Also, in light of the forty-five-minute discrepancy between Pierce's and Szymanski's original estimates of the offense, their emotional trauma from being robbed or shot, and Szymanski's lack of a watch, the jury reasonably could have found that Pierce and Szymanski were mistaken when they gave their statements to the police.

Donaldson also argues that the jury's verdict was contrary to the evidence because his physical appearance does not match Pierce's or Szymanski's description of him. Without conceding guilt in the Coney Island robbery, Donaldson further contends that the same person could not have committed both robberies, because Giles' description of the robber arguably fits Donaldson, but conflicts with Pierce's and Szymanski's description.

The discrepancies in the complainants' descriptions do not invalidate the jury's verdict. In his police statement, Pierce described the first robber, i.e., Donaldson, as a black male, nineteen years old or in his early twenties, five feet and seven or eight inches tall, 175 to 180 pounds, medium brown complexion, with a "low fade" haircut. Szymanski described Donaldson

as five feet, nine inches tall, 150 to 175 pounds, nineteen or twenty years old, medium complexion, with braided hair. At trial, Szymanski acknowledged that Donaldson appeared heavier than his 150- to 175-pound estimate, and stated that his prior estimate of Szymanski's height was "an approximate." Giles described Donaldson as five feet and five or six inches tall, 160 pounds, and a light brown complexion. At trial, Donaldson gave his own weight as 130 pounds, and his height as five feet, five inches. There is no objective evidence as to Donaldson's weight on October 3, 2002, but Blanks testified that Donaldson was five feet, four inches tall.

The discrepancies between the witnesses' descriptions and Donaldson's actual characteristics do not render the jury's findings inherently implausible. The discrepancies are minor and, although the witnesses varied in their quantitative assessments of the robber's height and weight, they generally agreed that the robber was a young adult, slim, shorter than average, with a medium complexion. This general description is consistent with Donaldson's claim that the Department of Corrections describes him as "5'4", 145 pounds," with a brown complexion. The jurors had the opportunity to observe Donaldson and make their own determination as to whether the witnesses' descriptions and estimates of the robber's weight and complexion comported with Donaldson's appearance. The jurors could have attributed any erroneous assessments of height and weight to the inherent difficulty of precisely quantifying visual observations. Viewed most favorably to the prosecution, the evidence was sufficient to support the jury's identification of Donaldson as the person who robbed Pierce and shot Szymanski at the Gold Coast Lounge.

III. Docket No. 249209

Solomon argues that the trial court erred in instructing the jury on aiding and abetting after the jury began deliberating. Solomon was not expressly charged as an aider and abettor, and the prosecutor neither requested an aiding and abetting instruction nor argued that his actions constituted aiding and abetting. Solomon argued that he had been misidentified. He did not argue that the person identified as himself was a non-participant in the robbery.

When the trial court originally instructed the jury, it did not include an aiding and abetting instruction. After the jury began deliberations, it submitted a question to the trial court: "Does Solomon have to have a weapon in his possession or is Donaldson considered to be his weapon?" Solomon argued that the trial court should instruct the jury that Solomon had to have a weapon in his possession, because the prosecutor never presented an aiding and abetting theory. The prosecutor advocated using the aiding and abetting standard instruction to answer the jury's query. The prosecutor argued that he had proceeded on the theory that Donaldson and Solomon committed the crime jointly and, although he did not specifically use the term "aiders and abettors," it was "quite obvious" that they aided and abetted each other. After some argument and consultation with both attorneys, the trial court read the standard instruction on aiding and abetting, CJI2d 8.1. Solomon now argues that this instruction allowed the prosecutor to belatedly add a new and different theory that he could not address or dispute.

Our Legislature has abolished the distinction between principals and aiders and abettors in the commission of a crime. MCL 767.39. Consequently, it is not necessary for a prosecutor to charge a defendant in any other form than as a principal, and a defendant may be charged as a principal and convicted as an aider and abettor. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds in *People v Mass*, 464 Mich 615, 628; 628

NW2d 540 (2001); *People v Lamson*, 44 Mich App 447, 450; 205 NW2d 189 (1973). We therefore conclude that the prosecutor's failure to previously expressly raise an aiding and abetting theory did not preclude the trial court from instructing on aiding and abetting in answer to the jury's question.

Our Supreme Court held in *People v Mann*, 395 Mich 472, 478; 236 NW2d 509 (1975), that an aiding and abetting instruction is appropriate where there is some evidence of a concert of action between the defendant and the principal. Here, Giles and Robinson testified that Solomon entered the restaurant with Donaldson, wearing pantyhose over his face like Donaldson, stood beside Donaldson during the robbery, and helped collect the stolen belongings. Because there was evidence of concert of action between Donaldson and Solomon, Solomon could be deemed an aider and abettor. The jury instruction was thus factually appropriate and it accurately and aptly responded to the jury's inquiry.

Solomon further argues that the aiding and abetting instruction was erroneous because it failed to inform the jury that an aider and abettor of a specific intent crime must either have the specific intent to commit the crime or aid the principal with knowledge that the principal has the requisite intent. Although Solomon objected to the trial court giving the aiding and abetting instruction, he did not object to the omission of an instruction on intent. Accordingly, we review this unpreserved issue for plain error affecting Solomon's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

The aiding and abetting instruction was given to address the jurors' question about the armed-with-a-weapon element of armed robbery. The trial court had previously instructed the jury that the prosecution must prove that Solomon specifically intended to permanently deprive Robinson or Giles of his money or property. The intent element of armed robbery was applicable regardless of whether the jury determined that Solomon was a principal or an aider and abettor, because an aider and abettor must possess the same level of intent with respect to the commission of the crime as the principal, and conviction of a crime as an aider and abettor does not require a higher level of intent than that required for conviction as a principal. *Mass*, *supra* at 628. Because the jury already had sufficient information as to the specific intent requirement of armed robbery, and sought information only as to the armed-with-a-weapon requirement, the trial court did not plainly err in failing to further instruct on the requisite intent for aiding and abetting.

Moreover, the specific error alleged by Solomon actually served to Solomon's advantage. Solomon correctly asserts that there are two means for proving that an aider and abettor possessed the requisite intent to commit a specific intent crime: either the aider and abettor himself possesses the requisite specific intent for the underlying crime, or the aider and abettor knows that the principal has the requisite intent. *People v King*, 210 Mich App 425, 429; 534 NW2d 534 (1995). He alleges that the instruction was incomplete because the trial court omitted the second means of proof. However, by omitting the alternative means of proof, the trial court actually increased the prosecutor's burden by requiring proof that Solomon himself intended to commit the robbery, not merely that he acted with knowledge of Donaldson's intent. Under these circumstances, the omission did not affect Solomon's substantial rights, and he is not entitled to relief on this basis.

Solomon argues that the trial court erred in declining his request for a jury instruction on the lesser offense of unarmed robbery. The trial court determined that the instruction was not warranted under *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), in which our Supreme Court held that "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." In *People v Reese*, 466 Mich 440, 441; 647 NW2d 498 (2002), the Supreme Court examined how the analysis in *Cornell* applied to a request for an unarmed robbery instruction as a lesser included offense of armed robbery. The defendant in *Reese* was accused of robbing an employee at a gas station. *Id*. at 442. There was no dispute that an armed robbery had been committed, as all the eyewitnesses testified that the perpetrator used a knife, the knife was found at a spot where the perpetrator had dropped some items, and a knife-like object was visible on the surveillance tape. *Id*. at 446. Applying *Cornell*, the Supreme Court reasoned that unarmed robbery was clearly a necessarily included lesser offense of armed robbery, and turned to the question of whether the evidence supported the unarmed robbery instruction. *Id*. at 446-447. The Court resolved this question against the defendant because there was "no real dispute concerning whether defendant was armed," the evidence of a weapon was "overwhelming," and the defendant did not dispute the presence of a knife, but instead argued that the robbery victim misidentified him and that she did not feel threatened by the robber's knife. *Id*. at 447-448.

In the instant case, Giles and Robinson unequivocally testified that Donaldson carried a pistol and that Solomon carried a shotgun, but Solomon maintained that the surveillance camera film was fuzzy, and did not "definitive[ly]" reveal the presence of a shotgun. These facts are analogous to *Reese*, where all the witnesses testified that the robber carried a knife, and where the surveillance film revealed a stick-like object that could have been a knife. *Id*. at 446. Solomon's defense, like the defense in *Reese*, was based on the premise of misidentification, not the absence of a gun. Furthermore, because Solomon could also be viewed as an aider and abettor, Donaldson's undisputed possession of a gun negated any possibility that the crime committed was only unarmed robbery. Accordingly, the trial court did not err in declining to give the instruction on unarmed robbery.

Solomon argues that the trial court erred in not reading his theory of the case to the jury. The trial court declined to do so, commenting that it did not read theories because it was not obligated to do so, and theories were only helpful when attorneys waived closing argument.

Generally, the trial court must give the defendant's theory of the case if it is supported by the evidence. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978); *People v Reed*, 393 Mich 342, 350; 224 NW2d 867 (1975). However, a trial court's failure to give the theory of the case when requested does not constitute error requiring reversal if the trial court adequately instructed the jury as to the defense theory of the case. *People v Barnes*, 146 Mich App 37, 48; 379 NW2d 464 (1985). In the instant case, defendant acknowledges that the substance of his theory of the case was not preserved as part of the record, but asserts that "its contents must have involved the identification process." Because the substance of defendant's theory of the case is not apparent from the record, we cannot determine whether it included anything not covered by the court's jury instructions. Assuming that the theory related to identification as defendant asserts, there was no error because the trial court instructed the jury on identification. Indeed, before proceeding to the elements of the charged offenses, the trial court asked the attorneys if it

had omitted or misstated anything from the general instructions. Solomon's counsel and the prosecutor both replied that it had not. Under these circumstances, there is no basis for concluding that the trial court's refusal to read the theory constituted an error requiring reversal.

Solomon also raises claims of prosecutorial misconduct. Solomon failed to preserve these claims with a timely objection at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id*., quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*.

Solomon cites several instances where the prosecutor stated in her closing argument that she had "proven" each element of armed robbery. Solomon contends that these statements were improper because the prosecutor was conveying her personal belief in Solomon's guilt and using the "weight of her office" to influence the jury.

A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office. See *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Here, however, the prosecutor's remarks that she had "proven" each element of the offenses and thereby proved Solomon's guilt were not an assertion of personal belief in defendant's guilt or an argument that the jury should convict Solomon, regardless of the evidence, based on the prestige of the prosecutor's office. The prosecutor made the remarks while commenting on the evidence, and, viewed in context, the clear meaning of the remarks was that the prosecutor had met her burden and proved her case by presenting this evidence. The remarks did not constitute plain error.

Solomon also argues that the prosecutor denigrated defense counsel during closing arguments when she stated:

> That's what we're here for, ladies and gentlemen. The obvious puzzle picture, ladies and gentlemen, not the smoke that defense counsel would like you to believe. Not the smoke or the misleading information or minor details the defense counsel want [sic] you to focus on to get you misled.

Solomon also cites the prosecutor's statements, "Don't be misled. Don't get caught up in the smoke," as instances of further denigration.

A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, the prosecutor's statements must be considered in light of defense counsel's arguments, and an otherwise improper remark is not error when made in response to defense counsel's arguments. *Id*. at 592-593. Here, the prosecutor's remarks about "smoke" and "misleading information" were made in response to defense counsel's attempts to undermine the prosecutor's case. Defense counsel argued that Giles' identification of Solomon at the lineup was unreliable

because Giles saw Solomon in the parking lot after the police returned to the crime scene. He further argued that, under these circumstances, Detective Blanks should have used more than five persons in the lineup, so that Giles would have had a less than twenty percent probability of picking the correct person by chance.[5] The prosecutor responded by pointing out that there was no twenty percent probability of a correct choice because Giles did not have to pick anyone. Considered in this context, the prosecutor's comments about "smoke" and "misleading information" were an acceptable response to defense counsel's closing argument. Accordingly, Solomon has not established error, plain or otherwise.

Solomon further argues that his counsel's failure to object to the prosecutor's remarks constituted ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001). Our analysis of the prosecutorial misconduct claims demonstrates that Solomon has failed to establish the "error" prong of the plain error standard. Consequently, defense counsel's failure to object was neither objectively unreasonable nor prejudicial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens

[5] At trial, Blanks admitted that if he had known of the inadvertent on-scene identification in the Coney Island parking lot, he would have used more than five persons in Solomon's lineup.